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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 733

THE CHARTER OAK FIRE INSURANCE COMPANY AND UNITED STATES FIRE INSURANCE COMPANY OF NEW YORK, *Petitioners,*

v.

HARRY J. GERRITY and BLANCHE HUNT GERRITY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF.

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v.

HARRY J. GERRITY and BLANCHE HUNT GERRITY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, The Charter Oak Fire Insurance Company and The United States Fire Insurance Company, respectfully represent that they are aggrieved by the decision and final judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-styled proceeding, rendered on the 20th day of February, 1950. By reason thereof, petitioners pray for the allowance of a writ of certiorari to be directed to that Court in order that the said judgment and decision may be reviewed by this Honorable Court.

In its decision the Court of Appeals disposed of two separate appeals by petitioners herein. Inasmuch as the claims of the respondents in both cases involve the same questions and were heard and briefed together in both courts below upon one record, joint certiorari application is hereby made by said petitioners in a single petition, with one brief in support thereof.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254 (1).

QUESTION PRESENTED

The sole question in this case concerns the proper meaning and application of the phrase "from hazards inherent therein" as it appears in the so-called Inherent Explosion Clause, which was made a part of each of the three fire insurance policies sued upon. The Clause in full reads:

> "INHERENT EXPLOSION CLAUSE: Insurance under this policy shall include liability for any direct loss caused by explosion occurring in the above described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels, located in any such structure."

More specifically, the question may be stated as follows: Where a person deliberately and intentionally, for reasons unknown, dismantles the gas apparatus in the basement of a dwelling so that an explosion ensues which destroys that dwelling, does such explosion occur from hazards inherent in the structure or dwelling, within the language and meaning of the aforementioned Clause?

SUMMARY OF THE CASE

(1) The facts which give rise to the foregoing question in the present case were stipulated by the parties (R. 8) and may be summarized as follows:

Respondents' dwelling at 6109 Nevada Avenue, N. W., Washington, D. C., was insured against loss by fire under three fire policies. The first, in the sum of $14,000, was issued by petitioner, The Charter Oak Fire Insurance Company, on February 3, 1944 (R. 8, 16). The second, in the sum of $5,000, was issued by the same petitioner on January 5, 1945 (R. 9, 26). The third, in the amount of $8,000 on the household and personal property located in said premises, was issued by petitioner, The United States Fire Insurance Company, on June 27, 1945 (R. 9, 34). All three policies were of the standard form and type prescribed for use within the District of Columbia. All three contained the usual clause exempting the companies from liability for loss due to explosion unless fire ensued, and in that event, for loss due to fire only (R. 9, 23, 28, 36). All three were amended by endorsement or liberalization to include an Inherent Explosion Clause which insured against losses caused by explosions occurring "from hazards inherent therein" (R. 9, 42). None of the three included an Extended Coverage Endorsement, which would have insured against "all direct loss by explosion" and which was available to respondents, as they were advised, at a slight additional premium (R. 9, 10, 16, 34, 44).

On February 26, 1946, at about 1:00 P. M. an explosion occurred in the aforesaid premises which completely demolished both the house and its contents. No one at the time was in the house except respondents' son, Edward H. Gerrity (R. 11). The latter's dead body was found after the explosion on the floor of the furnace room about four feet from the main gas line pipe (R. 12). This pipe branched off into two sections, one section feeding the hot water heater and the other feeding the gas furnace (R. 12).

Built into each section at a point just beyond the juncture was a locked cut-off valve; after the explosion, the lock washer and core on one of the branch pipes was found on the floor directly below the valve housing (R. 13). A hammer and monkey-wrench were found near the decedent's body, although these tools were customarily kept in the garage (R. 13, 14). The Safety Engineer of the Washington Gas Light Company and the Fire Marshal of the Washington Fire Department were of the opinion that the gas which had been permitted to flow freely into the basement by the removal of the lock washer and core had become ignited by the pilot light in either the furnace or heater (R. 12). This explanation of the explosion was adopted by the District Court in its finding of fact number 5 (R. 54) and is not disputed. It is agreed that Edward G. Gerrity, the decedent, had been moody and depressed since returning from the War, although he had made plans prior to the date of the explosion to return to college (R. 13). It is also agreed that so far as respondents knew all gas and electrical equipment were operating properly on the morning of the explosion (R. 13).

(2) The United States District Court for the District of Columbia (per Holtzoff, J.) found that the explosion was due to a "hazard inherent therein" within the meaning of the Inherent Explosion Clause and consequently held that respondents were entitled to recover the full amount of each of the three policies. In its opinion, the Court inferred that the decedent "had been working on the apparatus for some undetermined purpose, perhaps to make some repairs, and in so doing had accidentally or negligently removed the valve" (R. 49), and that "the explosion was caused by the negligence or carelessness on the part of someone, possibly the deceased" (R. 51). Having made these inferences, the Court attempted to distinguish the case of *Davies* v. *Hartford Fire Ins. Co.*, 75 F. (2d) 442 (C. C. A. 8th 1935) which on similar facts had denied recovery under an Inherent Explosion Clause. The

purported distinction, regarded by the District Court as controlling, arose from its reading of the *Davies Case* as standing for a rule (earnestly disputed by petitioners) that only intentionally and maliciously caused explosions are outside the coverage of the clause. Elsewhere in its opinion, the District Court appears directly to repudiate the holding of the Eighth Circuit in the *Davies Case* by observing that the very presence of gas in the home was alone a "hazard inherent therein" (R. 50).

(3) On appeal to the United States Court of Appeals for the District of Columbia Circuit, petitioners pointed out that the reasoning of Judge Sanborn of the Court of Appeals for the Eighth Circuit in the *Davies Case* applied with equal force to the factual situation in the present case. It was shown that the history of the Inherent Explosion Clause, the clear and unambiguous meaning of the words "hazards" and "inherent", and the recognized availability of comprehensive coverage afforded by Extended Coverage, all indicated that an erroneous construction had been placed upon the Clause by the District Court for the District of Columbia. It was further demonstrated that the inferences of negligence drawn by that Court could have no basis in the Agreed Statement of Facts upon which the case was submitted. The Court of Appeals, however, in a *per curiam* opinion on February 20, 1950, adopted the opinion of the lower court and accordingly affirmed the judgment. On March 11, 1950, the mandate of the Court of Appeals was stayed pending this application for certiorari.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the District of Columbia Circuit, in holding that an explosion caused by the deliberate dismantling of gas apparatus by insureds' son was a "hazard inherent" in the insured premises so as to come within the Inherent Explosion Clause, is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Davies v. Hartford Fire Ins. Co., 75 F. (2d) 442.

In the *Davies Case, supra,* the Circuit Court of Appeals for the Eighth Circuit held that the Inherent Explosion Clause attached to a fire policy did not afford coverage in a situation where a person deliberately diverted gas from a pipe in the basement so as to cause an explosion. Admittedly, in that case the diversion was for the purpose of causing fire or explosion, whereas in the present case decedent's purpose in diverting the gas cannot be definitely ascertained. But the Court of Appeals for the Eighth Circuit did not appear to rest its decision on the *subjective* purpose or intent of the human agent. It said (75 F. (2d) 442, 443):

> "That natural gas within a dwelling house is deliberately diverted from its intended domestic use, for the purpose of causing fire or explosion in order to destroy the property insured, does not relate the explosion to the hazards of the occupancy. *This explosion was a strange, unusual, and unnatural happening, and not within the contemplation of the parties to the contract of insurance.* It arose from what is usually referred to in insurance circles as a 'moral hazard', a hazard which inheres, not in buildings or in the character of their occupancy, but in the character of the persons who use, occupy, or enter them" (emphasis added).

The conflict is further illuminated by the fact that the opinion of the District Court in the present case, adopted

by the Court of Appeals, regards the mere presence of gas within the premises as a "hazard inherent" in the premises. Thus *any* gas explosion would be covered by the policies. Had the Eighth Circuit in the *Davies Case* taken this extreme position, it would have been obliged to have found for the insured. Gas exploded within the dwelling in the *Davies Case,* yet that Court held the explosion to be outside the coverage of the Inherent Explosion Clause.

II.

The decision of the District Court, as adopted by the Court of Appeals, in seeking to apply the rule of strict construction against petitioners where the provisions of the insurance contract are clear and unambiguous, is in conflict with repeated decisions of this Court and with the decision of the Circuit Court of Appeals for the Eighth Circuit in Davies v. Hartford Fire Ins. Co., 75 F. (2d) 442.

In its opinion, the District Court referred to and seemingly applied the well-established rule that in construing insurance policies, any ambiguity or doubt as to the meaning of a phrase or provision therein will be construed in favor of the insured (R. 49). The opinion of the District Court was adopted in its entirety by the Court of Appeals (R. 58). But this rule has no application where there is no ambiguity, and an ambiguity cannot be arbitrarily created by forcing from words unusual and unnatural meanings in order to apply the rule.

Imperial Fire Ins. Co. v. *County of Coos,* 151 U. S. 452, 38 L. Ed. 231, 14 S. Ct. 379 (1894);
United States Fidelity and G. Co. v. *Guenther,* 281 U. S. 34, 74 L. Ed. 683, 50 S. Ct. 165 (1930);
Bergholm v. *Peoria L. Ins. Co.,* 284 U. S. 489, 76 L. Ed. 416, 52 S. Ct. 230 (1932);
Williams v. *Union Central Life Ins. Co.,* 291 U. S. 170, 78 L. Ed. 711, 54 S. Ct. 348 (1934).

It is submitted that there is nothing ambiguous in the language of the Inherent Explosion Clause or, particu-

larly, in the words "hazards" or "inherent". The Circuit Court of Appeals for the Eighth Circuit in the *Davies Case* stated that the language of such a Clause was "*sufficiently plain and understandable*" and therefore expressly refused to apply the very canon of construction invoked by the District Court and approved by the Court of Appeals in this case.

III.

This case does not involve merely a question of the correct interpretation of an isolated private contract; the Inherent Explosion Clause, which was made a part of all three policies involved is either incorporated into the standard dwelling form or attached by endorsement to such form in every state except Texas. The question of interpretation here presented, therefore, is of an importance which transcends the particular case.

In petitioners' supporting brief and the appendix attached thereto, there are enumerated those states in which the Inherent Explosion Clause has been made a part of the standard Dwelling and Contents form of fire policy. Forty-three states and the District of Columbia are included in that list. The Clause itself, varying only in certain minor and immaterial respects from the language of the Clause involved in the present case, reads as follows:

> "This policy shall cover direct loss to the property covered caused by explosion occurring in the above described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels."

In four states (New Hampshire, New Jersey, New York and West Virginia), substantially identical coverage is granted by endorsement to the fire policy. In contrast to the additional premium charged for Extended Coverage,

which insures against *all* direct loss from explosion, the inherent explosion coverage is provided at no extra charge to the insured in all states but New York. In the latter state, there is a nominal charge of $.007 per $100 of insurance per annum for this coverage. Texas alone has not approved the use of the Inherent Explosion Clause.

In view of the foregoing, it is submitted that the proper meaning and interpretation of the Clause is a question of national importance and concern to policyholders and the companies alike. Yet, the conflict between the holdings of the Eighth Circuit in the *Davies Case* and that of the Court of Appeals in the instant case can only produce in the future the gravest confusion whenever and wherever the application of this clause is questioned. Unless this conflict is resolved by this Honorable Court, the precise scope and meaning of the Inherent Explosion Clause will remain in serious doubt and be productive of much needless litigation.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The United States District Court for the District of Columbia, per Holtzoff, J., rendered an opinion in this case on March 2, 1949. This opinion is reported in 82 F. Supp. 631 and may be found at pages 47 to 52 of the Record.

The United States Court of Appeals for the District of Columbia Circuit filed a *per curiam* opinion in this case on February 9, 1950. This opinion, wherein the Court adopted as its own the opinion of the District Court, appears at page 58 of the Record. It has not as yet been officially reported.

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT

This application for a writ of certiorari is made upon the authority of Title 28, United States Code, section 1254 (1). As the right of this court to review by certiorari the question herein presented is clearly given by statute, no cases are cited to support such right.

STATEMENT OF THE CASE

On February 26, 1946, an explosion occurred in the basement of the respondents' dwelling, located at 6109 Nevada Avenue, N. W., Washington, D. C., which explosion completely destroyed the dwelling and its contents. Investigation following the explosion disclosed that a lock washer and valve core had been removed from a branch gas line in the furnace room (R. 14). According to the Fire Marshal and Safety Inspector for the Gas Company, the explosion was caused by the resultant flow of gas, unimpeded, into the basement—the gas having been ignited by the pilot light in either the furnace or heater (R. 12). The District Court made a specific finding to this effect (R. 54). A few feet from the disassembled valve the body of respond-

ents' son was discovered (R. 12), and a hammer and monkey wrench were found on the floor nearby (R. 13).

The respondents' dwelling and its contents were insured against loss by fire by three policies issued by the petitioner companies (R. 8, 9, 16, 26, 34). Extended Coverage, which would have insured against all direct loss by explosion at an increased premium had been offered but was not taken out by respondents (R. 9, 10, 16, 34, 44). The three policies, in fact, contained express exemptions from liability for losses due to explosion (R. 9, 23, 28, 36). There was added to each policy, however, at no added charge to respondents, an "Inherent Explosion Clause" which read as follows:

> "INHERENT EXPLOSION CLAUSE: Insurance under this policy shall include liability for any direct loss caused by explosion occurring in the above described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels, located in any such structure." (R. 9, 42)

If respondents were to recover upon their fire policy it was apparent that recovery could be sought under this clause only. Thus, from the outset, the paramount question has concerned the application of the Inherent Explosion Clause and more particularly the meaning of the words "hazards inherent therein".

The Inherent Explosion Clause is a comparative newcomer to domestic dwelling policies and has been involved in only two prior decided cases. In *Sargent* v. *Mechanic's Insurance Co.*, 216 Iowa 688, 247 N. W. 267 (1933) an unexplained explosion *within* a heating furnace was held to have occurred from an inherent hazard; and in *Davies* v. *Hartford Fire Ins. Co.*, 75 F. (2d) 442 (C. C. A. 8th 1935) an explosion caused by a person having deliberately diverted gas from a pipe in the basement of a dwelling was held not to have occurred from an inherent hazard.

Petitioners regarded the *Davies Case* as convincing precedent. The District Court for the District of Columbia, however, purported to distinguish that case; inferred that the decedent had been engaged in repairing the apparatus; further inferred that he had done so carelessly or negligently; concluded that the explosion had thereby arisen from a "hazard inherent therein"; and entered judgment for respondents for the full amount of the policies (R. 55). In the Court of Appeals for the District of Columbia Circuit, petitioners pointed out that the lower court had misconstrued the *Davies Case.* They urged that the *Davies Case,* coupled with the availability of the broader Extended Coverage Endorsement and the clear meaning of the words "hazards" and "inherent", required a holding for petitioners. They further submitted that there was no basis in the facts for the District Court's inferring a need for repairs, that repairs had been undertaken, or that such repairs were negligently made. They also pointed out that the District Court had pyramided inferences which had no basis in the stipulated facts in arriving at its controlling inference and consequent conclusion of coverage. Petitioners further cited established authority to the effect that it was not only the right but the *duty* of the Court of Appeals to reexamine the agreed statement of facts and to disregard those findings and inferences having no basis in fact. These arguments notwithstanding, the Court of Appeals affirmed the judgment of the District Court and adopted that Court's opinion as its own (R. 58).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding, contrary to the decision of the United States Circuit Court of Appeals for the Eighth Circuit in *Davies* v. *Hartford Fire Ins. Co.,* 75 F. (2d) 442 (1935), that an explosion of the sort here involved was included within the purview and coverage of The Inherent Explosion Clause of a standard fire policy.

(2) In adopting as its own the opinion of the District Court, thereby making certain controlling inferences which had no warrant or basis in the Agreed Statement of Facts.

(3) In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

I. *The decision of the Court of Appeals for the District of Columbia Circuit, in holding that an explosion caused by the deliberate dismantling of gas apparatus by insureds' son was a "hazard inherent" in the insured premises so as to come within the Inherent Explosion Clause, is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Davies* v. *Hartford Fire Ins. Co.*, 75 F. (2d) 442.

1. The opinion of the District Court, adopted by the Court of Appeals, directly repudiates the holding of the Eighth Circuit in the *Davies Case*, by regarding the mere presence of gas in a dwelling, without regard to the inducing cause of the explosion, as a "hazard inherent therein".
2. The courts below have misconstrued the real holding of the *Davies Case* and have distinguished the present case in a manner unjustified by either the holding of that case or the Agreed Statement of Facts in this case.

II. *The decision of the District Court, as adopted by the Court of Appeals, in seeking to apply the rule of strict construction against petitioners where the provisions of the insurance contract are clear and unambiguous, is in conflict with repeated decisions of this Court and with the decision of the Circuit Court of Appeals for the Eighth Circuit in Davies* v. *Hartford Fire Ins. Co.*, 75 F. (2d) 442.

III. *This case does not involve merely a question of the correct interpretation of an isolated private contract;*

the Inherent Explosion Clause, which was made a part of all three policies involved, is either incorporated into the standard dwelling form or attached by endorsement to such form in every state except Texas. The question of interpretation here presented, therefore, is of an importance which transcends the particular case.

ARGUMENT

I.

The decision of the Court of Appeals for the District of Columbia Circuit, in holding that an explosion caused by the deliberate dismantling of gas apparatus by insureds' son was a "hazard inherent" in the insured premises so as to come within the Inherent Explosion Clause, is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Davies v. Hartford Fire Ins. Co., 75 F. (2d) 442.

The explosion involved in the *Davies Case* arose when a person or persons unknown entered the basement of the insureds' dwelling, disconnected a pipe carrying natural gas to the furnace, and placed a certain combustible material near the escaping gas with the intent of causing an explosion. The house and contents were insured against fire under a policy to which, by rider, there had been attached an Inherent Explosion Clause. The language of that clause was very similar to the clause involved in the present case. It insured against loss from explosion resulting from "hazards inherent in the occupancy", whereas the instant clause insures against explosions occurring from "hazards inherent therein". The Trial Court sustained a demurrer to the complaint in an action brought upon the policy. On appeal from the order sustaining the demurrer, the Eighth Circuit held that inasmuch as the explosion could not be said to have resulted from a hazard inherent in the building or its occupancy, the Inherent Explosion

Clause did not afford coverage. It therefore affirmed the judgment of the Trial Court. The relevant portions of the Circuit Court's opinion will be discussed in succeeding paragraphs.

1. *The opinion of the District Court, adopted by the Court of Appeals, directly repudiates the holding of the Eighth Circuit in the Davies Case, by regarding the mere presence of gas in a dwelling, without regard to the inducing cause of the explosion, as a "hazard inherent therein".*

It is perfectly clear that had the Circuit Court of Appeals for the Eighth Circuit in the *Davies Case* regarded the presence of natural gas in the home as *per se* an inherent hazard, it would have been compelled to have reversed the judgment of the lower court and ordered the demurrer overruled. It would not have mattered who caused the explosion, how it was caused, or why it was caused; the fact that *gas* exploded would have been controlling upon the question of the disposition of the demurrer and of the case.

In spite of this implicit holding of the *Davies Case,* respondents in this case, in their argument in the District Court and in their brief and argument before the Court of Appeals, contended that the mere presence of gas in the insureds' dwelling, without more, constituted a "hazard inherent therein". That both Courts below apparently saw fit to adopt these arguments, is revealed by the following passage from the District Court's opinion, adopted by the Court of Appeals:

> "The possibility or risk of an accidental explosion, no matter how remote, is a characteristic or attribute to any system of apparatus for supplying illuminating gas. The appliances formed part of the insured property and, therefore, this possibility was a 'hazard inherent therein'." (R. 50)

Petitioners therefore submit that the opinion of the Court of Appeals, in holding that a gas explosion, whatever

its origin, would be within the coverage of the Inherent Explosion Clause, is in direct conflict with the opinion and holding of the Eighth Circuit in *Davies* v. *Hartford Fire Ins. Co., supra.*

2. *The courts below have misconstrued the real holding of the Davies Case and have distinguished the present case in a manner unjustified by either the holding of that case or the Agreed Statement of Facts in this case.*

Perhaps in realization of the foregoing, the District Court and, by virtue of having adopted that Court's decision, the Court of Appeals appear to rest their decisions on an alternate ground—i. e., they endeavour to distinguish the *Davies Case.* In so doing, the Courts below are required to place what petitioners believe to be undue emphasis upon the fact that the *Davies* explosion was caused maliciously by someone with intent to destroy the premises. Thus, the Courts below read the *Davies Case* as standing for the narrow rule that only intentionally and maliciously caused gas explosions are outside the coverage of the Inherent Explosion Clause. With this interpretation of the *Davies Case* as its major premise, the District Court drew a series of unwarranted inferences which, in the aggregate, constituted its minor premise. Without any basis in the agreed statement of facts, it first presupposed a need for repairs to the gas apparatus; then inferred that decedent had been engaged in its repair; and finally, inferred that he had done so negligently or carelessly (R. 49). Malicious intention to cause an explosion thus negatived, the Court concluded that the *Davies Case* was inapplicable and found for respondents.

Petitioners submit that the *Davies Case* is not nearly so narrowly bottomed. They believe that a careful reading of the opinion will indicate that it was the fact of *a deliberate diversion of gas from its intended domestic use* that led the Eighth Circuit to hold as it did. The concluding language of that opinion is surely significant:

> "That natural gas within a dwelling house is deliberately diverted from its intended domestic use, for the purpose of causing fire or explosion in order to destroy the property insured, does not relate the explosion to the hazards of the occupancy. *This explosion was a strange, unusual, and unnatural happening, and not within the contemplation of the parties to the contract of insurance.* It arose from what is usually referred to in insurance circles as a 'moral hazard,' *a hazard which inheres, not in buildings or in the character of their occupancy, but in the character of the persons who use, occupy, or enter them.*" (Emphasis added)

With equal force it can be said that the explosion in the instant case was a "strange, unusual, and unnatural happening"; that it certainly was "not within the contemplation of the parties"; that the hazard was one which inhered "not in buildings or in the character of their occupancy, but in the character of the persons who use, occupy, or enter them".[1] Petitioners submit that the fact that gas was "deliberately diverted from its intended domestic use" was decisive in the determination of the *Davies Case* and should be decisive in the determination of this case.

Secondly, petitioners take issue with the lower courts on the validity of the inferences drawn by the District Court in order to "distinguish" the *Davies Case*. It is believed that there is ample warrant in the agreed statement of facts for the District Court to have made the following inferences: (1) that the escape of gas from the dismantled apparatus, combined with the flame in the furnace or hot water heater caused the explosion; and (2) that the gas escaped because the valve was intentionally dismantled by the deceased. The Court, however, has further inferred

[1] It is noteworthy, in the light of the District Court's efforts to attach some significance to the different phraseology of the Inherent Explosion Clause in the *Davies Case* ("hazards inherent in the occupancy" as against "hazards inherent therein"), that the Court in the *Davies Case* apparently used "buildings" and "occupancy" interchangeably.

(3) that the dismantlement was performed "perhaps to make some repairs" and (4) that the repairs were "accidentally or negligently" made. This last step or steps, petitioners submit, have *no* warrant in the agreed statement of facts and can only be founded upon pure conjecture or surmise.

There is absolutely nothing in the agreed statement that so much as hints of a *need* for repairs. On the contrary, the only portion of the agreed statement that can have any bearing on the question suggests just the opposite conclusion.[2] It is expressly stipulated that:

> "So far as is known by plaintiffs when they left the house that morning there was no evidence of any leaking gas and the gas furnace, hot water heater, and all gas and electrical equipment were operating properly." (R. 13)

Furthermore, an appreciation of the nature of the apparatus involved and decedent's action in connection therewith completely negate any conjectural inference of repairs. Had anything been wrong with either the hot water heater or the gas furnace, it would have been a simple operation to turn the cut-off valve on either line a quarter turn, thereby preventing any further flow of gas. In contrast, by means of a hammer and wrench decedent loosened and removed the lock nut holding the valve in place, loosened and removed a lock washer, and pulled or knocked the entire valve core out of the pipe. The result, as he must surely have known, was to allow a full and unimpeded flow of gas to enter the basement. By the very nature of the appara-

---

[2] As was pointed out before the Court of Appeals, when, as here, a case is submitted entirely upon an agreed statement of facts, an appellate court is free to disregard the lower court's findings of fact or inferences drawn therefrom. *Wigginton* v. *Order of United Commercial Travelers*, 126 F. (2d) 659, (C. C. A. 7th 1942), cert. den. 317 U. S. 636, 63 S. Ct. 28, 87 L. Ed. 513 (1942); *Orvis* v. *Higgins*, — F. (2d) —, 13 F. R. Serv. 52a.42 Case 7 (C. C. A. 2nd 1950); cf. *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. (2d) 462 (C. C. A. 9th 1941).

tus, it must be conceded that decedent's actions were deliberate and purposeful rather than careless or negligent. The core could not drop or fall out; in order to be removed, it had to be jarred loose and manually, with conscious effort, pushed or pulled from its position in the valve.

A careful reading of the District Court's opinion suggests that the Court was itself aware of some possible gaps in its reasoning. The difficulty implicit in making the jump from the agreed facts to the deduction which the Court regarded as decisive of the case is evidenced, we believe, by the cautious language in which the deduction is couched. "It is a reasonable *deduction,*" the Court said, "*that the deceased* had been working on the apparatus *for some undetermined purpose, perhaps to make some repairs. . . .*" And again, "The agreed facts in the instant case *lead to the inference* that the explosion was caused *by the negligence or carelessness on the part of someone, possibly the deceased.*" The very language used admits of uncertainty. It seems rather clear that the Court itself was troubled over the reasonableness of its "reasonable" deductions.

Moreover, the validity of the District Court's deductions or inferences *qua* inferences depends entirely upon the correctness of its two original inferences. Petitioners submit that the District Court, in order to find a ground on which it could distinguish the *Davies Case,* has violated the well-established rule that allowable inferences must each have a reasonable basis in the facts and cannot be predicated or pyramided one upon the other.

United States v. *Ross,* 92 U. S. 281, 23 L. Ed. 707 (1876);
Standard Acc. Ins. Co. v. *Nicholas,* 146 F (2d) 376 (C. C. A. 5th 1944);
Orrill v. *Prudential Life Ins. Co. of America,* 44 F. Supp. 902 (N. D. Cal. 1942);
20 Am. Jur., "Evidence" §§ 164, 165;
Annotation, 95 A. L. R. 162.

In summary, petitioners submit that the District Court's opinion, adopted by the Court of Appeals, is in direct conflict with the opinion of the Eighth Circuit in *Davies* v. *Hartford Fire Ins. Co., supra,* in three respects: (1) in regarding the mere presence of gas in the dwelling as an inherent hazard *per se;* (2) in considering the *Davies Case* as standing for the narrow rule that only intentionally and maliciously caused explosions are not "hazards inherent" in a dwelling; and (3) in applying, as detailed in the section that follows, the rule of strict construction to the clear and unambiguous language of the Inherent Explosion Clause.

II.

The decision of the District Court, as adopted by the Court of Appeals, in seeking to apply the rule of strict construction against petitioners where the provisions of the insurance contract are clear and unambiguous, is in conflict with repeated decisions of this Court and with the decision of the Circuit Court of Appeals for the Eighth Circuit in Davies v. Hartford Fire Ins. Co., 75 F. (2d) 442.

By way of preface to its discussion of the phrase "hazards inherent therein", the District Court observed:

> "It is well established that since insurance policies are drawn by insurance carriers, any ambiguity or any doubt as to the meaning of a phrase or provision contained in the insurance contract, will be construed in favor of the insured and against the Company." (R. 49)

This is, of course, a perfectly sound canon of construction, but this case is not one for its application. There can be no ambiguity or doubt as to the meaning of the words "hazard" and "inherent". They are common, apt, non-technical words, capable of being construed in their plain, ordinary and popular sense. "Hazard", of course, is commonly understood to mean "risk" or "danger", which in turn suggests a degree of foreseeability. And "inherent"

means something that inheres in or is a part of something, independent of the active presence or interference of individuals. Petitioners, in the Court of Appeals, pointed out that both the dictionary and those cases which had construed either word supported that which petitioners had always regarded as their clear meaning. And, as lending further support to the view that these words were *not* intended to be construed in any special or technical manner, petitioners cited the history of the Inherent Explosion Clause and called to the Court's attention the much broader protection afforded by an Extended Coverage Endorsement.

Where, of course, the words of a policy are *not* ambiguous and *not* of doubtful meaning, this Court has repeatedly held that the rule of construction invoked by the District Court can have no application.

> *Imperial Fire Ins. Co.* v. *County of Coos,* 151 U. S. 452, 38 L. Ed. 231, 14 S. Ct. 379 (1894);
> *United States Fidelity and G. Co.* v. *Guenther,* 281 U. S. 34, 74 L. Ed. 683, 50 S. Ct. 165 (1930);
> *Bergholm* v. *Peoria L. Ins. Co.,* 284 U. S. 489, 76 L. Ed. 416, 52 S. Ct. 230 (1932);
> *Williams* v. *Union Central Life Ins. Co.,* 291 U. S. 170, 78 L. Ed. 711, 54 S. Ct. 348 (1934).

In the *Bergholm Case, supra,* this Court clearly stated:

> "It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; *but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or under the guise of construction, by forcing from plain words unusual and unnatural meanings.*" (Emphasis added)

Petitioners submit that the District Court has but half-stated the rule of construction to be applied to insurance contracts and in so doing has applied that part of the rule which this Court has often repudiated when the language

of the contract is as clear and unambiguous as in the present case. In this connection, it is highly significant that the Court of Appeals for the Eighth Circuit in the *Davies Case* deemed the language of an Inherent Explosion Clause, which was practically identical to the Clause here involved, to be *"sufficiently plain and understandable"*. That Court *expressly rejected,* as inapplicable to such a clause, the canon of construction applied by the District Court in this case. In so doing, the Eighth Circuit used the *very same* language, quoted above, that this Honorable Court employed in *Bergholm* v. *Peoria L. Ins. Co., supra.*

It would be difficult to imagine a more obvious conflict in decisions. One Court of Appeals has examined an Inherent Explosion Clause and has found its language "plain and understandable"; another Court of Appeals, in adopting the lower court's opinion as its own, has found language, which for comparative purposes is identical, to be tainted with "ambiguity" and "doubt". It is obvious that both cannot be right; either the words "hazard" and "inherent" are plain in meaning or they are ambiguous. This *patent* conflict beween the two opinions, petitioners believe, furnishes further reason for this Honorable Court to grant certiorari in this case.

III.

This case does not involve merely a question of the correct interpretation of an isolated private contract; the Inherent Explosion Clause, which was made a part of all three policies involved, is either incorporated into the standard dwelling form or attached by endorsement to such form in every state except Texas. The question of interpretation here presented, therefore, is of an importance which transcends the particular case.

While the use of an Inherent Explosion Clause in connection with a domestic fire policy is of comparatively recent origin, the Clause has now been incorporated as a part

of the standard Dwelling and Contents form in use in forty-three states and the District of Columbia. Listed alphabetically, those jurisdictions are:

1. Alabama
2. Arizona
3. Arkansas
4. California
5. Colorado
6. Connecticut
7. Delaware
8. Florida
9. Georgia
10. Idaho
11. Illinois
12. Indiana
13. Iowa
14. Kansas
15. Kentucky
16. Louisiana
17. Maine
18. Maryland
19. Massachusetts
20. Michigan
21. Minnesota
22. Mississippi
23. Missouri
24. Montana
25. Nebraska
26. Nevada
27. New Mexico
28. N. Carolina
29. N. Dakota
30. Ohio
31. Oklahoma
32. Oregon
33. Pennsylvania
34. Rhode Island
35. South Carolina
36. South Dakota
37. Tennessee
38. Utah
39. Vermont
40. Virginia
41. Washington
42. Wisconsin
43. Wyoming
44. District of Columbia

The precise language of the Clause, now uniform in the above states, varies only in certain minor and immaterial respects from that found in the Inherent Explosion Clause which is the subject of the present suits. What changes have been made in wording were made for purposes of streamlining or simplification; the crucial words "hazards inherent therein" appear in the standard clause just as they appear in the Clause here involved, as may readily be seen from the tabular comparison here set forth:

Inherent Explosion Clause (In This Case)	Inherent Explosion Clause (Now in 43 States and District of Columbia)
"Inherent Explosion Clause: Insurance under this policy shall include liability for any direct loss caused by explosion occurring in the above described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels, located in any such structure."	"This policy shall cover direct loss to the property covered caused by explosion occurring in the above described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels."

In four states (New Hampshire, New Jersey, New York and West Virginia) the Inherent Explosion Clause is attached to the usual fire policy by way of endorsement. Again, with the possible exception of New York, the language of the Clause used in each of the states is almost identical to the language of the Clause upon which the present suits were brought. For purposes of comparison, petitioners have included in an appendix to this brief copies of the Inherent Explosion Endorsement in effect in each of these states.

In forty-six of the forty-seven states (Texas alone has not approved the use of the Clause), Inherent Explosion coverage is granted at no charge to the insured. Similarly, no charge is made for the inclusion of the Clause in the District of Columbia. Only New York makes a charge for this coverage, and there the amount is a nominal $.007 per annum for each $100 of insurance. By way of contrast, in all states an insured must pay an additional premium for

the much broader explosion coverage afforded by the Extended Coverage Endorsement.

As a result of the decision of the Court of Appeals, grave doubts have been cast upon the limits of coverage afforded by the Inherent Explosion Clause. It is petitioners' sincere conviction that this decision, when read in conjunction with the conflicting decision of the Circuit Court of Appeals for the Eighth Circuit in *Davies* v. *Hartford Fire Ins. Co.*, 75 F. (2d) 442 (1935), will produce certain confusion and encourage needless litigation whenever recovery for explosion damage is sought under this Clause. Petitioners therefore submit that the question is one of such importance that it should be settled, and the conflict resolved, by this Honorable Court.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that a writ of certiorari should be granted for the purpose of reviewing the decision and judgment of the Court of Appeals for the District of Columbia Circuit herein complained of.

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APPENDIX

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Manager

H. W. Ploucquet
Assistant Manager

ALLIED LINES ASSOCIATION

85 John Street

New York 7, N. Y.

Telephone Beekman 3-4360.1.2

In Reply Please Quote
Estimate No. .....

March 17, 1950.

Mr. William E. Miller,
c/o Steptoe & Johnson,
1139 Shoreham Building,
Washington, D. C.

Dear Mr. Miller:

INHERENT EXPLOSION CLAUSE

Since I did not receive your letter confirming our telephone conversation of yesterday, I will attempt to give you the desired information in accordance with my understanding over the phone.

The Dwelling and Contents form containing the following Inherent Explosion Clause—

> "This policy shall cover direct loss to the property covered caused by explosion occurring in the above described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels."

is filed with a Manual containing the forms or the form itself is filed in the States of—

Alabama	Louisiana	Oklahoma
Arizona	Maine	Oregon
Arkansas	Maryland	Pennsylvania
California	Massachusetts	Rhode Island
Colorado	Michigan	South Carolina
Connecticut	Minnesota	South Dakota
Delaware	Mississippi	Tennessee
Florida	Missouri	Utah
Georgia	Montana	Vermont
Idaho	Nebraska	Virginia
Illinois	Nevada	Washington
Indiana	New Mexico	Wisconsin
Iowa	N. Carolina	Wyoming
Kansas	N. Dakota	District of Columbia
Kentucky	Ohio	

and the coverage is granted without charge.

In the States of New Hampshire, New Jersey, New York and West Virginia, the Inherent Hazard coverage is granted by endorsement to the fire policy. Copies of the endorsements for these States are enclosed herewith. There is a charge for the endorsement in New York State of .007 per $100. of insurance per annum.

The Inherent Hazard Clause is not used in the State of Texas.

I hope this additional information will be of some assistance to you.

Yours very truly,

/s/ W. F. Roembke,
Manager.

WFR:B
Encl.

ENCLOSURES

1. Inherent Explosion Clause in Use in New Hampshire and West Virginia.

Insurance under this policy shall include liability for any direct loss to property covered by this policy caused by explosion occurring in the above described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for explosion

originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels, located in any such structure.

Attached to and forming part of Policy No. .....
of the ..... Insurance Company, issued at its
.....Agency.
Dated.....19.... .....Agent

2. Inherent Explosion Clause in Use in New Jersey.

This policy shall cover direct loss to the property covered caused by explosion occurring in the above described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels.

3. Inherent Explosion Clause in Use in New York.

1. In the interest of the Insured, the condition of this policy excluding loss from explosion is hereby modified, and, in consideration of the rate at which this policy is written, this Company shall be liable for any direct loss to the following described property (only while said property is covered by this policy) .....

.....Here List and Describe the Property on Which Liability for.....

.....Inherent Explosion is Assumed.....

....No Liability is Assumed Except on Property Described in this Space....

caused by explosion occurring in any structure which constitutes a part of the plant of which the property insured hereunder is a portion, or occurring in any structure containing property insured hereunder. Provided, further, that in each and every instance the explosion results from the hazards inherent in the business as conducted therein and not otherwise and except as hereinafter provided.

2. Exclusions: This Company shall not be liable for loss occasioned by or incident to the explosion, collapse or rupture of steam or hot water boilers, water heaters, steam pipes, or their connections, internal combustion engines, steam engines, fly-wheels, pulleys, abrasive wheels or moving or rotating parts of machines, unless fire ensues and then for loss by fire only.

3. If there shall be any other fire insurance on the property covered by this policy, this Company shall be liable only for such proportion of any direct loss caused by fire or by any hazard covered by this Inherent Explosion Clause, as the amount of this policy bears to the whole amount of fire insurance applying whether such other fire insurance contains a similar clause or not; subject, however, to the limitations of Paragraph 4.

4. It is a further condition of this policy that if there be other insurance other than Fire Insurance Contracts covering any hazard assumed under this Inherent Explosion Clause, in the event of loss covered by this Inherent Explosion Clause, the insurance under this policy shall apply pro rata to each individual property unit with all such other insurance covering such unit, in the proportion that the value of each such individual unit bears to the total value of all property covered by this policy.

5. The liability of this Company for any or all of the hazards insured hereunder shall not exceed the amount of this policy nor the interest of the Insured in the property herein described and shall be subject in all other respects to the terms and conditions of this policy.

6. When this Inherent Explosion Clause is attached to a policy covering Business Interruption, Extra Expense, Rent, Leasehold Interest, Profits and Commissions, the term "direct loss" as used above in this Inherent Explosion Clause means loss as limited and conditioned in such policy, resulting from direct loss to the described property from the peril insured against under this Inherent Explosion Clause.

Attached to and forming part of Policy No. ..... of the ..... Insurance Company, issued at its .....N. Y., Agency.

Dated.....19.... .....Agent

FILE COPY

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FILED
APR 18 195
CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 733.

THE CHARTER OAK FIRE INSURANCE COMPANY and UNITED STATES FIRE INSURANCE COMPANY OF NEW YORK,
Petitioners,

v.

HARRY J. GERRITY and BLANCHE HUNT GERRITY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Washington, D. C.,

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April, 1950.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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HARRY J. GERRITY and BLANCHE HUNT GERRITY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The District Court opinion is reported in 82 F. Supp. 631. It is also printed at R. 47-52; and the Court's Findings of Fact and Conclusions of Law are at R. 52-55.

Argument was had in the Court of Appeals on February 9, 1950; and that Court rendered a *per curiam* opinion on February 20th (R. 58), which is not yet officially reported.

JURISDICTION.

Petitioners invoke Section 1254(1), Title 28, United States Code, in applying for the issuance of a writ of certiorari.

COUNTER-STATEMENT.

Petitioners' Summary (Br. 3-5) and Statement of the Case (Br. 11-13) contain certain inaccuracies and omissions. Without attempting to point them all out, the respondents respectfully request the Court to examine the Agreed Statement of Facts (R. 8-15), upon which the cases were submitted to the District Court. There was no testimony or other evidence submitted by either party. The Agreed Statement of Facts disclosed all known facts which bore upon the question of liability of the petitioners herein; and it was prepared and agreed upon by both counsel for all parties hereto.

Petitioners state (Br. 4) that the District Court's finding of fact number 5 (R. 54) is not disputed. The District Court therein found that the explosion was caused by the escape of gas from the pipe after the valve was withdrawn and by the gas becoming ignited by one of the pilot lights. It also should be noted that in its finding of fact number 6 (R. 54) the District Court found that—

> "6. The explosion was not caused purposely or maliciously by anyone, with intent to destroy the house and its contents or for any purpose, and the plaintiffs neither caused nor had any knowledge of the explosion or any event leading up thereto until after its occurrence."

Nowhere in the Agreed Statement of Facts (R. 8-15), or in the Findings of Fact by the District Court (R. 52-55), is there any evidence or finding of a deliberate and intentional attempt to destroy the respondents' house and its contents; and petitioners are quite inaccurate in stating (R. 4) that "on similar facts" recovery was denied under an inherent explosion clause in *Davies* v. *Hartford Fire Insurance Co.*, 75 F. (2d) 442.

Likewise, petitioners are in error in stating (Br. 5, 7, 16) that the District Court held, contrary to the *Davies Case*, that the very presence of gas in the home was alone a

"hazard inherent therein" (R. 50). What the District Court held was that "any system of apparatus for supplying illuminating gas" created the risk or possibility of an accidental explosion, and that, "The appliances formed part of the insured property and, therefore, this possibility was a 'hazard inherent therein'." (R. 50.) The facts in the *Davies Case,* and more especially the language and scope of the inherent explosion clause, are distinctly dissimilar to those involved in the instant cases. Hence, that case is clearly distinguishable, as we shall later show. The Court of Appeals and the District Court below have so decided.

ARGUMENT.

I.

No Question of Sufficient General Importance is Presented by Petitioners to Warrant Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Petitioners endeavor under Point III (Br. 8-9, 23-26) to impress upon the Court that the question presented herein is one of "national importance". (Br. 9.) They have gone outside the record; and we think that the inclusion of the material in the Appendix (Br. 27-30) is quite inappropriate, to say the least. Rule 38(5)(c) refers to cases "Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, * * * which has not been, but should be, settled by this court." We submit that no such case as this can reasonably be within the contemplation of the aforesaid rule.

The inherent explosion clause did not become a part of fire insurance policies in the District of Columbia until about January, 1945. In a tabular comparison (Br. 25) petitioners show that the present form or language of the inherent explosion clause differs from that in use in 1946, when respondents suffered loss by explosion. If necessary to protect petitioners in the future the language of the

inherent explosion clause can be changed again, if they and other fire insurance companies do not wish to accept the decision of the Courts below in the instant cases as a precedent. Changes in existing or outstanding policies can lawfully be made by the underwriters at any time when policies are renewed, usually in one year, or three years. If it is desired to exclude all gas explosions as inherent hazards such a provision can be included in the "exclusory" phrase of the inherent explosion clause.

The policy involved in *Davies* v. *Hartford Fire Insurance Co.*, 75 F. (2d) 442, was issued on December 1, 1931. The language of the inherent explosion clause there involved is exactly like that involved in the case of *Sargent* v. *Mechanics Insurance Co.*, 216 Iowa 688. The *Davies Case* was decided on February 14, 1935,—the *Sargent Case* on March 14, 1933. It should be noted that the opinion in the *Davies Case* does not even mention or cite the *Sargent Case*, decided by the Supreme Court of Iowa nearly two years earlier. If these decisions were in conflict (and they surely were not, because of the differing factual situations involved), a petition for a writ of certiorari to this Court might have been filed in the *Davies Case*. That was fifteen years ago. No other court cases involving an inherent explosion clause have been found by the able counsel for petitioners.

It is a fair inference, we think, that losses under the older or newer types of the inherent explosion clause are paid and settled by most fire insurance companies without litigation. It is common knowledge that there are hundreds of gas explosions in dwellings throughout the country each year. Over a period of twenty years there is a paucity of litigation involving the inherent explosion clause in any form. Petitioners do not state the year when the inherent explosion clause became a part of fire insurance policies in the forty-three States listed at Br. 24, but the *Davies* and *Sargent Cases* disclose that in South Dakota and Iowa such coverage was furnished without additional cost nearly

twenty years ago. In New York, the inherent explosion clause is apparently limited to business properties; e.g., "from the hazards inherent in the business as conducted therein and not otherwise" (Br. 29).

The law of insurance is mainly a question of contract terms, all of which are matters controlled by the insurance companies themselves. It does not require the exercise of jurisdiction by this Court upon certiorari to properly interpret the meaning or application of such a provision in fire insurance policies as that involved herein. The State courts or the lower Federal courts are fully able to resolve such questions of interpretation under the varying factual circumstances which every explosion loss involves.

II.

No Real Conflict Exists Between the Decision of the Eighth Circuit Court of Appeals in Davies v. Hartford Fire Insurance Co., 75 F. (2d) 442, and the Decision of the District Court, Affirmed Herein Per Curiam by the Court of Appeals for the District of Columbia Circuit.

The Court will readily recognize that all explosions, at all times, have a background of varying facts and circumstances. On the facts no two cases are likely to be alike or even similar. In the lower Courts, the respondents maintained that no other conclusion than that of liability upon the part of the petitioners could have been reached on the basis of the facts and circumstances as stipulated. The District Court gave no consideration to the matter of Extended Coverage. It is nowhere mentioned in the Court's opinion (R. 47-52) or the Findings of Fact (R. 52-55).

The Courts below did not repudiate or disregard the decision of the Eighth Circuit Court of Appeals in *Davies* v. *Hartford Fire Insurance Co.*, 75 F. (2d) 442. Their view of the scope of that case does not merit a further review of the instant matter in this Court. The facts in both cases are different. The terms of the inherent explosion clause in

both cases are different. The scope or application of any court decision is to be determined by the facts and the law involved therein. The *Davies Case* was not intended to lay down any general rule for all future cases. Counsel for petitioners distort the true scope of the opinion in the *Davies Case;* and also place undue emphasis upon isolated facts, involved in the instant cases, out of the context and fair meaning of the Agreed Statement. Some factual statements (Br. 19, 20) have no support whatever in the Agreed Statement and are not found therein. Counsel improperly state that, "The core could not drop or fall out; in order to be removed, it had to be jarred loose and manually, with conscious effort, pushed or pulled from its position in the valve" (Br. 20). The record is devoid of any such factual evidence.

The District Court, in its opinion (R. 51) stated:

> "The *Davies* case, therefore, by no means governs the case at bar. Here no basis exists for any finding that the explosion was purposely or maliciously caused with intent to destroy the house and its contents."

The important fact in the *Davies Case, supra,* is stated in the opinion, as follows:

> "The explosion was purposely and maliciously caused by a person or persons unknown to the insured, *intending to destroy the house and its contents.*" (Italics supplied.)

The Eighth Circuit Court of Appeals also stated:

> "The explosion coverage was limited to losses caused by explosions resulting from *hazards inherent in the occupancy* of the premises as a dwelling house, * * *. It is not necessary to determine what kinds of explosions would be covered by the rider. The rider was never intended to cover, and clearly does not cover, an explosion *resulting from a deliberate attempt of some person, either known or unknown, to destroy the insured premises.*" (Italics supplied.)

The three sentences from the *Davies Case* opinion, as quoted by petitioners (Br. 6, 18), are taken out of their true context and do not reflect the holding of the Eighth Circuit Court of Appeals. The lower Courts in the instant matter clearly and definitely distinguished the *Davies Case* as follows (R. 51):

> "Another consideration that deserves attention is that in the *Davies* case, the explosion rider covered explosions resulting from 'hazards inherent in the occupancy'. In the instant case the clause covers 'hazards inherent in the dwelling'. The former relates to hazards arising out of the occupancy. The latter, *which is much broader,* relates to hazards inherent in the structure itself." (Italics supplied.)

Petitioners are not justified in arguing (Br. 17) that the nub of the court's holding in the *Davies Case* "was the fact of a deliberate diversion of gas from its intended domestic use", without relating this fact to the express terms of the policy, under which "coverage was limited to losses caused by explosions resulting from hazards inherent in the occupancy of the premises as a dwelling house." There is no conflict between the decisions of the lower Courts herein, and the ruling in the *Davies Case,* on the theory that the very presence of gas (natural or manufactured) in the home is *per se* an inherent hazard. The Courts below (Br. 16) held that any system of apparatus for supplying illuminating gas, and the "appliances" forming part of the insured property, was a hazard inherent therein, which might create the possibility or risk of an accidental explosion, no matter how remote.

Petitioners state (Br. 12) that in *Sargent* v. *Mechanics Insurance Co.,* 216 Iowa 688, "an unexplained explosion *within* a heating furnace was held to have occurred from an inherent hazard." This is not quite accurate, because the Supreme Court of Iowa stated (page 693) that an explosion "occurred in the furnace, * * * a hazard certainly inherent in the occupancy." Some one (the insured's son-

in-law) fixed or tampered with the furnace improperly. Unlike the facts in the *Davies Case,* the facts in the *Sargent Case* were within the scope of the normal use and occupancy of the premises; and there was no evidence of an intent to destroy the house and its contents. Just as the *Sargent Case* is different, and distinguishable, from the *Davies Case,* so the instant cases are no more in conflict with the *Davies Case* than that case was in conflict with the *Sargent Case.*

We submit, there is no real conflict between the holding of the Courts below, and the Eighth Circuit Court of Appeals, because the terms of the inherent explosion clauses are different in each case. In our opinion, however, the *Davies Case* was wrongly decided, if the inherent explosion clause in that case was the same as here, viz., "from hazards inherent therein". This, however, is not the question presented by the petition herein.

Apparently, what the petitioners ask this Court to do, is to broaden the scope of the decision in the *Davies Case, supra,* and, in effect, to re-write for them and other fire insurance companies the clear and unambiguous terms and provisions of the so-called inherent explosion clause,—often of doubtful application under the varying facts and circumstances which accompany all gas explosions.

III.

The Inherent Explosion Clause in the Respondents' Insurance Policies Clearly Covers the Loss Caused by Explosion Under the Facts and Circumstances Involved Herein.

The three fire insurance policies involved herein are in fact combination fire *and* explosion policies. We submit, that a loss caused by an explosion occurring within a dwelling is, of necessity, from a hazard inherent therein. The fact that an explosion has occurred pre-supposes that there was a pre-existing explosion hazard within the dwelling. As Mr. Justice Holmes said in *Pierce Oil Corp.* v. *Hope,* 248 U.S. 498, 63 L. Ed. 381: "We may take judicial notice

that disastrous explosions have occurred for which no satisfactory explanations have been offered. The unexpected happens."

If a coal furnace is a hazard inherent in the *occupancy* of a dwelling (*Sargent* v. *Mechanics Insurance Co.*, 216 Iowa 688), then it is also a hazard "inherent therein," within the meaning and intent of the inherent explosion clause in the policies of respondents. The explosion in the instant cases was from gas, and the "hazards inherent" in the dwelling must necessarily include the gas pipes or conduits, valves, meters, and other apparatus for conveying the gas to the furnace,—as well as the furnace itself.

Gas in pipes is an explosion hazard inherent in all dwellings. Whether properly confined or not, the hazard of explosion is potential, at least. By its very nature, gas is an explosive force. The language of the inherent explosion clause contemplates both latent and patent hazards. A mysterious or inexplainable explosion should be regarded as arising from an inherent though perhaps latent hazard. Normally a patent or obvious explosion hazard will call for special explosion insurance. An explosion policy, so-called, is well known in insurance circles.

If a person uses or misuses a kitchen gas range, and an explosion results, then clearly under the provisions of fire insurance policies containing the inherent explosion clause, such as here involved, the explosion must be deemed to result from a hazard inherent in the dwelling. The District Court aptly observed (R. 50) that: " 'Hazards inherent therein' are by no means limited to spontaneous explosions. If this were the case, the clause would not be of very much value."

A leaking gas pipe must be regarded as an inherent hazard. An automobile with gasoline in the tank is an inherent hazard in a dwelling where there is a basement garage. A fuel oil tank supplying a furnace is also an inherent hazard. Gas accumulating in a coal furnace is explosive; and the furnace is an inherent hazard, as held in the *Sargent*

Case, supra. It is commonly recognized that gas in a kitchen stove is an explosion hazard. Electricity in a dwelling is *both* a fire and an explosion hazard inherent therein. If gas seeps into a basement or cellar, and causes an explosion, this would be an inherent hazard.

It is only fair to infer that the possibility or probability of explosion was contemplated by the petitioners and respondents, otherwise the inherent explosion clause would be meaningless. The language used refers to something that would or might explode,—or the sort of explosion hazards which inhere in all dwellings. An unused coal furnace will not explode, but when in use it is clearly an explosion hazard. Inherent hazards may exist which never result in an explosion.

In the Court of Appeals, the petitioners argued that "There is an inherent hazard in practically everything but most things are not inherently hazardous unless wrongfully used, * * *." That is, of course, the very reason for obtaining insurance protection. The exclusory language in the inherent explosion clause is some indication of the kinds of inherent hazards which the insurers (petitioners) had in mind. This language indicates that they *only intended to exclude* explosions caused *by steam* in boilers, pipes, turbines and engines, etc.

Therefore, it is reasonable to conclude that all other kinds of inherent hazards are covered under the inherent explosion clause. Also, this clearly implies that such explosions would necessarily be from hazards inherent in the dwelling. If it were intended to exclude a gas explosion, the word "gas" could have been included as part of the exclusory provisions of the inherent explosion clause.

It is erroneous for the petitioners to contend that the *Davies Case* holds that a gas explosion, whatever its origin, would not be within the coverage of the inherent explosion clause, especially under the much broader coverage provisions contained in the clause as herein involved.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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